

1 THE HONORABLE RICHARD A. JONES
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 IN RE CLASSMATES.COM)
10 CONSOLIDATED LITIGATION) No. CV09-45 RAJ
11) DECLARATION OF MARK A. GRIFFIN
12) IN SUPPORT OF PLAINTIFFS'
13) MOTION FOR AWARD OF
14) ATTORNEYS' FEES AND COSTS AND
15) PARTICIPATION AWARDS
16) TO THE CLASS REPRESENTATIVES
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I, Mark A. Griffin, declare pursuant to the penalties of perjury under 28 U.S.C. § 1746 as follows:

1. I am a Partner at Keller Rohrback L.L.P., one of the law firms appointed as Class Counsel in this case. I have been personally involved in the litigation of this matter and am responsible for the prosecution of this action. I make this Declaration based on personal knowledge and am competent to testify to the matters set forth herein.

2. I submit this declaration in support of Plaintiffs' Motion for Award of Attorneys' Fees and Costs and Participation Awards to the Class Representatives.

3. The purpose of this declaration is to summarize the factual and procedural history of this litigation, including, but not limited to, the initial filing and investigation of this action, the amended complaint, discovery, motion practice, settlement negotiations, and litigation

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1 expenses.

2 4. Keller Rohrback L.L.P. has considerable experience in class action litigation, as
 3 illustrated by the firm's Complex Litigation Group Resume, a true and correct copy of which is
 4 attached hereto as Exhibit A. During the past 20 years, the Complex Litigation Group at Keller
 5 Rohrback L.L.P. has litigated dozens of class action cases that resulted in the recovery of over \$4
 6 billion for the benefit of victims of price fixing conspiracies, securities fraud, breaches of
 7 fiduciary duties, and deceptive practices. The Complex Litigation Group's resume and website
 8 identify twenty-two class action antitrust cases that resulted in almost \$3 billion in cash
 9 recoveries and fourteen class action securities fraud cases that resulted in over \$330 million in
 10 cash recoveries. In addition, Keller Rohrback has recovered over \$750 million for employees on
 11 behalf of their retirement savings plans.

12 5. On October 30, 2008, Plaintiff Anthony Michaels filed his complaint against
 13 Defendants in the Los Angeles Superior Court. The Michaels complaint was removed to the
 14 U.S. District Court for the Central District of California and then transferred by stipulation of the
 15 parties to the U.S. District Court for the Western District of Washington. Dkt. Nos. 12, 13, and
 16 15. Two months after the Michaels complaint was filed, Plaintiff Xavier Vasquez filed a similar
 17 class action complaint that was removed and assigned to the Hon. Marsha J. Pechman of the
 18 Western District of Washington. By Orders dated April 30, 2009, the Michaels and Vasquez
 19 matters were consolidated. Dkt. No. 45.

20 6. The attorneys representing Mr. Michaels and Mr. Vasquez filed competing
 21 motions for appointment of lead counsel. After considering the briefing on those motions, "the
 22 court required each group [of competing counsel] to submit objective information about what
 23 their representation would cost the putative class. The court ordered the groups to be specific
 24 about the costs of their services, and in particular to state whether they would agree to a cap on
 25 their fees." Dkt. No. 51. The Court appointed Kabateck Brown Kellner LLP and Keller
 26 Rohrback L.L.P. as interim class counsel, noting that they agreed to progressively cap their

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1 attorneys fees in the event that they ultimately recover a percentage of a common fund awarded
 2 to the class. “The cap varies from 15% (if the case is resolved prior to a motion for class
 3 certification) to 22.5% (if the case resolved after class certification and the submission of post-
 4 certification litigation material).” Interim class counsel also agreed to limit their multiplier to 2.0
 5 or less if the court awards attorney fees via the lodestar method based upon their schedule of
 6 hourly fees. *Id.* at 2-3.

7 7. At the Court’s direction, interim class counsel filed an amended complaint to
 8 govern all claims in the consolidated action. They dropped Mr. Vasquez as a Plaintiff and added
 9 David Catapano. The Amended Consolidated Class Action Complaint (“Complaint”) (Dkt. No.
 10 59) alleges only Washington law causes of action, including claims under the Washington
 11 Consumer Protection Act (“CPA”) and the Washington Commercial Electronic Mail Act
 12 (“CEMA”).

13 8. After a mediation session before the Hon. Steven Scott, Ret., but before moving
 14 for class certification, the parties negotiated the terms of a Class Action Settlement Agreement
 15 (“Settlement Agreement”) subject to Court approval. Indeed, in order to keep their fee request
 16 under the 15% cap agreed to with the Court, which cap was set to increase to 20% immediately
 17 upon the filing of plaintiffs’ motion for class certification (Dkt. No. 50), the parties twice sought
 18 and obtained Court approval to extend the deadline for filing their motion for class certification.
 19 Dkt. Nos. 67 and 68. The Settlement Agreement provides for the certification of a main class of
 20 all registered Classmates users since October 30, 2004 and a “subclass” of approximately 3.1
 21 million “Gold Members” who paid a classmates.com membership fee. The parties agree to settle
 22 this action for: a) a total aggregate amount not to exceed \$9.5 million in cash to the “subclass;”
 23 b) a \$2.00 offer of credit to each of Classmates’ millions of non-paying subscribers; c) injunctive
 24 relief (described below); d) attorneys’ fees not to exceed \$1.3 million as may be awarded by the
 25 Court; and e) costs of suit, including participation awards to the Class Representatives not to
 26 exceed \$2,500 each, as may be awarded by the Court. The parties have amended the Settlement

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1 Agreement so that attorneys' fees will not exceed \$1,050,000. A true and correct copy of this
 2 amendment is attached to this Declaration as Exhibit B.

3 9. The Settlement Agreement provides for substantial injunctive relief that will
 4 modify the Guestbook feature and revise the Privacy Policy of Classmates for a period of two
 5 years, following entry of the Final Approval Order and Judgment. Plaintiffs' impetus for this
 6 lawsuit was the alleged misleading nature of the Guestbook feature of the emails sent by
 7 Classmates. The specific language of the injunctive relief was appended to the Supplemental
 8 Notice of Proposed Class Action Settlement ("Supplemental Notice"). Dkt. No. 88. A true and
 9 correct copy of the Supplemental Notice is attached to this Declaration as Exhibit C.

10 10. After the parties reached agreement on the class settlement, they separately
 11 negotiated Defendants' agreement to pay attorneys' fees, reimburse the costs of litigation, and
 12 make case contribution awards to the Plaintiffs Michaels and Catapano. Dkt. No. 69. The
 13 parties agreed that Defendants would pay up to \$1.3 million in Class Counsel's fees, subject to
 14 Court approval, based on the understanding that it was less than 15% of the \$9.5 million cash
 15 common fund available to the "subclass" that was the agreed upon attorneys' fees limit arising
 16 out of the contested leadership motion. Dkt. No. 51.

17 11. On April 19, 2010, the Court granted preliminary approval to the Settlement
 18 Agreement and appointing Keller Rohrback L.L.P. and Kabateck Brown Kellner LLP as Class
 19 Counsel. Dkt. No. 76. After the parties made revisions to the settlement website in response to
 20 the Court's minute order, the Court directed that the class be provided with email and publication
 21 notice. Dkt. No. 78. In accordance with these orders, 56,860,107 email notices were sent to
 22 class members by July 18, 2010 and the court-approved summary notice was published in the
 23 *Wall Street Journal* on July 4, 2010. Dkt. No. 88.

24 12. In early August, Class Counsel sent a letter to the 24 class members who had
 25 expressed unhappiness (regardless of whether they had lodged a formal objection) and had
 26 provided contact information, with information about their proposed \$1.3 million fee award. The

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1 letter stated:

2 This letter is being written to respond to your request for information about the
 3 attorneys' fees and costs incurred by Class Counsel in the above-captioned matter.
 4 The Notice of Proposed Class Action Settlement that was sent to you states,
 5 "Class Counsel will ask the Court for attorneys' fees and costs to be paid in
 6 conjunction with this Settlement. Defendants have agreed not to oppose Class
 7 Counsel's request to the Court for attorneys' fees up to \$1.3 million, plus costs."
 8 As of July 31, 2010, Class Counsel (Keller Rohrback L.L.P. and Kabateck Brown
 9 Kellner L.L.P.) has incurred about \$1.2 million in fees plus \$43,666.55 in costs.
 10 More fees and costs will be incurred to bring this matter to conclusion.

11 True and correct copies of these letters are attached to this Declaration as Exhibit D. One class
 12 member objected that the proposed \$1.3 million fee award was too small. A true and correct
 13 copy of that objection is attached to this Declaration as Exhibit E. However, no class member
 14 objected to the award of costs of suit, including participation awards to the Class
 15 Representatives not to exceed \$2,500 each.

16 13. Considering the enormous number of people who were sent the notice, the
 17 number of objections received to date is extraordinarily low. Almost all of the objections
 18 focused on the total amount of fees that are being sought compared with the modest size of the
 19 recovery available to each of the over 50 million individual class members.

20 14. At the Court's direction, the parties filed a Joint Statement Regarding Settlement
 21 on September 23, 2010 (Dkt. No. 88). That Joint Statement proposed a new schedule for seeking
 22 final approval of the Settlement Agreement as mandated by *In re: Mercury Interactive Corp.*
Sec. Litig., No. 08-17372, 2010 U.S. App. LEXIS 17189 (9th Cir. August 18, 2010). It also
 23 advised the Court that the parties had amended the Settlement Agreement to reduce the amount
 24 of the attorneys' fee award to be sought by Class Counsel by \$250,000 from \$1.3 million to
 25 \$1,050,000. In addition, the amendment provided for the additional *cy pres* contribution of
 26 \$500,000 that will be made by Defendants to a charity to be approved by the Court. The Court
 set a new schedule to comply with *Mercury* and approved the distribution of the Supplemental
 Notice. Dkt. No. 90. Pursuant to that new schedule, Plaintiffs' Motion for Award of Attorneys'

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1 Fees and Participation Awards to the Class Representatives and the declarations in support of
 2 that motion are to be filed and posted on the settlement website, www.cmemailsettlement.com,
 3 prior to the new November 19, 2010 deadline for objecting to the request for attorneys' fees.

4 15. I have had gathered and have had attorneys review the time and expense reports
 5 from Keller Rohrback L.L.P. and Keller Rohrback P.L.C. (our affiliated law firm in Phoenix,
 6 Arizona) ("Keller Rohrback"). The detailed billing records describing the hours and costs spent
 7 on this litigation by Keller Rohrback is attached hereto as Exhibit F.

8 16. Keller Rohrback has devoted significant time and effort to this case since its
 9 filing. To date, Keller Rohrback devoted more than 1,750.25 attorney and professional hours to
 10 the prosecution of this case. The hours claimed were incurred by, among other things,
 11 investigating the claims against Defendants, reviewing and analyzing documents and
 12 information, preparing the Amended Complaint and amendments thereto, conducting necessary
 13 legal research, retaining and working with an expert, pursuing discovery, preparing materials for
 14 class certification, engaging in extensive settlement negotiations, and preparing the necessary
 15 agreements and pleadings related to the settlement.

16 17. Since the inception of this case, in accordance with their normal business
 17 practices, Keller Rohrback has and does maintain detailed and contemporaneous records of the
 18 time spent by their lawyers, law clerks, paralegals, and certain other personnel on this action.
 19 Our timekeepers have been and are required to keep daily time-records, both noting amounts of
 20 time spent on projects and providing descriptions of that work. These records then are
 21 computerized, checked, and maintained in databases. These systems allow us to be confident
 22 that the hours reported for this case are accurate.

23 18. The hourly rates charged by Keller Rohrback in this case, between \$165 and \$740
 24 per hour, are the rates that have been or could be charged as usual and customary hourly rates for
 25 their work performed for non-contingency fee clients and in other class action cases. Counsel's
 26 hourly rates have been paid by hourly clients and/or, separately, approved for payment by federal

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1 and state courts in other class and derivative litigations, for many years and throughout the time
 2 this litigation has been pending.

3 19. If these hours had been billed on a “straight” hourly basis (i.e., no contingency
 4 and no risk of non-payment), the lodestar (hours times current billing rates) for this professional
 5 time would be \$752,452.85, as set forth in Exhibit F hereto.

6 20. The lodestar figures are based on Keller Rohrback’s current billing rates and
 7 contemporaneous time records. Expense items are billed separately and such charges are not
 8 duplicated in the firm’s billing rates.

9 21. Significant additional attorney hours will be necessary after October 1, 2010, the
 10 date as of which the above numbers were compiled, to complete the remaining work on this
 11 case. In addition to incurring hours in connection with the final approval hearing, based on its
 12 experience with numerous other settlements of comparable cases, Keller Rohrback anticipates
 13 that it will spend a substantial amount of additional time over the next several months
 14 responding to inquiries from Class members and generally shepherding implementation of the
 15 settlement. Keller Rohrback does not intend to apply for reimbursement of additional fees,
 16 substantial as they may be, incurred after Final Approval.

17 22. The Settlement Agreement expressly provides that Defendants will pay Class
 18 Counsel’s litigation expenses in the amount awarded by the Court in addition to all of the other
 19 benefits of the Settlement Agreement.

20 23. Keller Rohrback requests reimbursement for the reasonable and necessary
 21 expenses advanced to prosecute this litigation since its inception. These expenses, totaling
 22 \$13,376.57, are detailed in Exhibit F hereto.

23 24. Keller Rohrback advanced significant unreimbursed expenses of the litigation.
 24 The expenses incurred in this action are commercially reasonable and are reflected on Keller
 25 Rohrback’s books and records. These books and records are prepared from expense vouchers,
 26 check records, and other source materials, and they represent an accurate record of the expenses

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1 incurred. The expenses include necessary travel, expert witnesses and copying, as well as
 2 telephone, fax, computer aided research, and document database storage and maintenance.

3 25. Keller Rohrback charged \$0.10 per page for black/white copies and \$0.70 per
 4 page for color copies. This billing rate was set to partially recoup the costs of labor, paper, copy
 5 machine lease payments, and other overhead costs directly attributable to making copies. The
 6 firm does not make a profit on the internal copy charges. For large copy projects, my firm sends
 7 the copy projects to outside vendors to make copies. The lowest rate that we pay for such
 8 copying services varies between \$0.12 and \$0.20 for black/white 8.5x11 copies. For color
 9 copies, we are charged either \$0.99 (8.5x11) or \$1.98 (11x17). The actual amounts paid to
 10 outside vendors for copies on the matter were billed to this matter.

11 26. Attached as Exhibit G is a spreadsheet that shows the actual out-of-pocket
 12 expenditures incurred by Keller Rohrback for Westlaw Research on this matter. To determine
 13 the actual charges for this matter, my firm's librarian logged onto Westlaw's QuickView+
 14 system, which is an online tool that can be used to track all Westlaw usage in the firm. For each
 15 month in which there were charges in the Classmates case, she went to the "Create Report"
 16 screen and selected the month's data to download into an Excel file and chose the "Apply
 17 Special Pricing" option. The librarian then clicked on "Submit," and on the next screen, "Select
 18 Special Pricing Report Options," she entered the applicable "monthly fixed amount" which is the
 19 flat rate amount Keller Rohrback paid pursuant to its Westlaw contract. It should be noted that
 20 the flat rate amount Keller Rohrback pays Westlaw changes periodically as content plus usage
 21 changes with our contract. The "monthly fixed amount" and the amount of our firm's usage are
 22 used by QuickView+ to calculate the discount we receive on Westlaw's retail costs as listed in
 23 the spreadsheet. Each monthly QuickView+ report that the librarian downloaded included usage
 24 for multiple client matter numbers for those months. She copied the Classmates usage from each
 25 month and pasted that usage into Exhibit G to create a report that would show only the
 26 Classmates usage. The librarian determined the Classmates usage by the client matter number

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1 or description entered by users. This information shows up in the "Client" column. Then she
2 added the subtotals for each month under the "Total Charge" column and labeled the subtotals
3 with the dates in which billing reports were added to our billing database by our accounting
4 department. The librarian also added the grand total at the end of the report which accounts for
5 the total Westlaw charges for this matter.

6 27. To date, Keller Rohrback has received no compensation for either their time or
7 expenses over the nearly two years that this case has been pending. Class Counsel's fees and
8 expenses are totally contingent and dependent on a fee and expense award by this Court.

9 28. In undertaking to represent the Class, Class Counsel had to ensure that sufficient
10 resources and funds existed at all times, not only to prosecute the litigation in a cost-effective
11 manner, but also to compensate vendors and the experts that we had engaged in support of class
12 certification, and that would have soon been required had the case proceeded. The financial
13 burden on contingent fee counsel is far greater than it is on firms that are paid on an ongoing
14 basis throughout lengthy and complex litigation.

15 29. Attached as Exhibit H is a true and correct copy of the July 10, 2009 Order
16 Awarding Attorneys' Fees and Reimbursement of Expenses from In re Northwest
17 Biotherapeutics Inc. Securities Litigation, No. C07-1254-RAJ (W.D. Wash.).

18 30. Attached as Exhibit I is a true and correct copy of the July 22, 2010 objection of
19 the settlement in this matter filed by Alan Silverberg. On page 4 of this objection, Mr.
20 Silverberg states that "to my understanding [\$2,500 each] is a fairly small amount for acting as a
21 lead plaintiff...."

22 Dated this 12th day of October, 2010, in Seattle, Washington.

23
24 s/ Mark A. Griffin
25 Mark A. Griffin
26

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